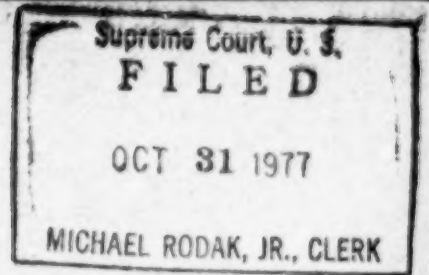


77-627

No. 77-



**In the
Supreme Court of the United States**

OCTOBER TERM 1977

THE AUSTIN NATIONAL BANK, INDIVIDUALLY,
AND AS GUARDIAN OF THE ESTATE OF ROBERT
O. WALTERS, III, AN INCOMPETENT,

PETITIONER,

v.

JOHN E. NORTON, ET AL,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

77-627
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2300 Austin National Bank Tower
Austin, Texas 78701

(512) 478-6421

INDEX

	Page
Opinions Below.....	2
Jurisdiction.....	2
Question Presented.....	2
Statutes Involved.....	2
Statement.....	2
Reason for Granting the Writ.....	3
Conclusion.....	4
Certificate of Service	4
Appendices — Table of Contents	5

CITATIONS

Cases:

<i>Glasgow v. McKinnon</i> , 14 S.W. 1050 (Tex. Sup. 1890).....	3
<i>In Re Guardianship of Estate of Neal</i> , 407 S.W.2d 770 (Tex. Sup. 1966).....	3

Statutes:

Texas Probate Code	
§ 233	2, 3
§ 242.....	2, 3
28 U.S.C. § 1254 (1).....	2

**In the
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OCTOBER TERM 1977

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O. WALTERS, III, AN INCOMPETENT,

PETITIONER,

V.

JOHN E. NORTON, ET AL,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Austin National Bank, Individually, and as Guardian of the Estate of Robert O. Walters, III, an Incompetent (Petitioner), petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on October 15, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix A) is not yet reported. The order of the Court of Appeals denying Petitioner's petition for rehearing (Appendix B) is not yet reported. The judgment of the Court of Appeals issued as a mandate (Appendix C) is not yet reported. The judgment of the United States District Court for the Western District of Texas, San Antonio Division (Appendix D) is not reported.

JURISDICTION

The opinion of the Court of Appeals was rendered on August 15, 1977. Petitioner timely filed its petition for rehearing which was denied on September 14, 1977 (Appendix B), and this petition is filed within ninety (90) days of that date. Petitioner filed its motion to stay the issuance of the mandate and this motion was granted on September 30, 1977 (Appendix E). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Petitioner, as guardian of the estate of an incompetent, may lawfully pay a fifty percent (50%) contingent attorneys' fee in light of the prohibition in the Texas Probate Code against contingent fees exceeding one-third of the amount recovered on behalf of the ward.

STATUTES INVOLVED

The Texas Probate Code, §§ 233 and 242 are involved and are reproduced in Appendix F.

STATEMENT

Respondents invoked the jurisdiction of the district court below because of diversity of citizenship between Petitioner, a national bank with its principal place of business in Austin, Texas, and Respondent, an attorney residing in the State of Illinois. Respondent represented the ward in a personal injury action. Petitioner was duly appointed as guardian of the estate of that ward.

Respondent obtained a judgment exceeding \$1,000,000.00 on behalf of the ward. After that judgment was taken and an appeal initiated, that lawsuit was settled for the sum of \$647,500.00. Respondent then made claim upon Petitioner as guardian for the payment of attorneys' fees equal to fifty percent (50%) of the amount recovered on behalf of the ward. Petitioner paid attorneys' fees equal to one-third of the amount recovered and refused to pay the difference between the fifty percent (50%) fee claimed and the thirty-three and one-third percent (33-1/3%) fee, because Petitioner believes the Texas Probate Code to prohibit such a payment. Respondent then initiated the instant case in the District Court below to collect his claim. The District Court below granted summary judgment for Petitioner. Respondent appealed and the Court of Appeals below reversed the judgment that had been entered.

REASON FOR GRANTING THE WRIT

There is a compelling reason why this Court should grant a writ of certiorari herein. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of the highest State court (the Texas Supreme Court) construing the Texas Probate Code, in *Glasgow v. McKinnon*, 14 S.W. 1050 (Tex. Sup. 1890); *In Re Guardianship of Estate of Neal*, 407 S.W. 2d 770 (Tex. Sup. 1966). Even if the instant case were properly characterized as a "collateral attack", which it is not, an illegal contract is subject to such an attack.

Purely state law questions were presented to the District Court below (diversity of citizenship was the sole basis of jurisdiction). Texas law is clear that the general provision for approval of "reasonable" attorneys' fees under § 242 of the Probate Code (Appendix F) is controlled by the specific prohibition in § 233 of the Texas Probate Code against contingent attorneys' fees in excess of one-third of the amount recovered. Literally tens of thousands of estates and millions of dollars are administered in Texas under these provisions. The opinion of the Court of Appeals below in a diversity case,

casts doubt upon what has been the clear rule of statutory construction in Texas. If permitted to stand, guardians, in order to obtain legal services for a ward, may be forced to accept contingent fee contracts that have been made illegal and against public policy by the Legislature.

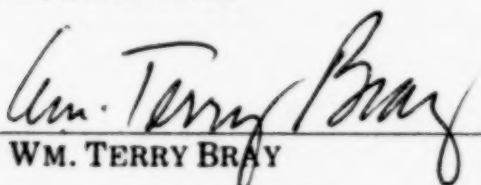
CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD

2300 Austin National Bank Tower
Austin, Texas 78701

By 
WM. TERRY BRAY

COUNSEL FOR PETITIONER

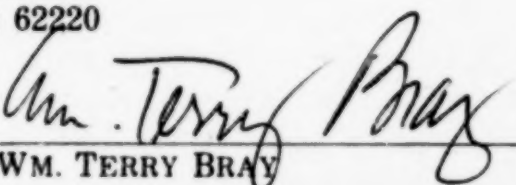
OCTOBER 1977

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served upon Respondents by mailing same on October 28, 1977, to their attorneys of record as provided by Rule 33(1) and (2a), Supreme Court Rules at the following addresses:

Robert B. Summers, Esq.
Clark, Thornton & Summers
1910 Tower Life Bldg.
San Antonio, Texas 78205

Edward J. Kionka, Esq.
211 West Main Street
Belleville, Illinois 62220


WM. TERRY BRAY

APPENDICES TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, No. 75-3356, <i>John E. Norton, et al v. The Austin National Bank of Austin, Texas, Individually and as Guardian of the Estate of Robert O. Walters, III</i> , August 15, 1977.....	6
APPENDIX B: Order of the United States Court of Appeals for the Fifth Circuit on Petition for Rehearing, No. 75-3356, <i>John E. Norton, et al v. The Austin National Bank of Austin, Texas, Individually and as Guardian of the Estate of Robert O. Walters, III</i> , September 14, 1977	10
APPENDIX C: Judgment of the United States Court of Appeals for the Fifth Circuit issued as a mandate, No. 75-3356, <i>John E. Norton, et al v. The Austin National Bank of Austin, Texas, Individually and as Guardian of the Estate of Robert O. Walters, III</i> , August 15, 1977	11
APPENDIX D: Judgment of the United States District Court for the Western District of Texas, San Antonio Division, C. A. No. SA-74-CA-148, <i>John E. Norton, et al vs. The Austin National Bank of Austin, Texas, Individually and as Guardian of the Estate of Robert O. Walters, III, an Incompetent</i> , May 23, 1975	12
APPENDIX E: Appellee's Motion for Stay of Mandate Pending Application to Supreme Court for Writ of Certiorari, filed September 22, 1977	15
APPENDIX F: Texas Probate Code § 233	19
Texas Probate Code § 242	19

APPENDIX A

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

John E. NORTON et al.,
Plaintiffs-Appellants,

v.

The AUSTIN NATIONAL BANK OF
AUSTIN, TEXAS, Individually and as
guardian of the Estate of Robert O.
Walters, III, Defendant-Appellee.

No. 75-3356.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1977.

Action was brought to recover attorney fees pursuant to retainer contract by attorneys who represented guardian of estate of mentally incompetent in a personal injury case. The United States District Court for the Western District of Texas, at San Antonio, Manuel L. Real, J., sitting by designation, granted motion of guardian for summary judgment and the attorneys appealed. The Court of Appeals, Simpson, Circuit Judge, held that after more than two years since date of entry of judgment of Texas probate court approving contingent fee contract, which was allegedly in violation of Texas statute, such judgment was safe from collateral attack.

Reversed.

Judgment = 475

Where retainer agreement, signed by Texas guardian of Texas mentally incompetent and providing for contingency fee of up to 50% with respect to personal injury claim on behalf of incompetent, was approved by Texas probate court and judgment was in effect for more than two years, judgment, which was entered by a court of competent jurisdic-

tion, was safe from collateral attack upon ground that contingency fee contract contravened Texas statute. V.A. T.S. Probate Code, §§ 31, 233, 242.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

This is an action for attorneys' fees brought by the attorneys who represented the guardian of the estate of Robert O. Walters, III, an incompetent, in a personal injury case. The district court granted the motion of defendant guardian for summary judgment, and this appeal followed. We reverse.

FACTS

In 1966, Robert O. Walters, III, was employed by an engineering firm to work as a surveyor on a gas transmission pipeline being constructed by Trunkline Gas Company in Tennessee, Kentucky and Illinois. On August 23, 1966, Walters was apparently walking or running across railroad tracks which bisected the construction site when he was struck in the head by a passing train. Walters as a result was so seriously injured that he was rendered a mental incompetent, with no prospect of recovery. On July 3, 1967, the County Court of Bexar County, Texas, sitting as a probate court, declared Walters mentally incompetent and appointed his father, Robert O. Walters, Jr., as Guardian of the person and of the estate of his son.

On March 10, 1970, Walters, Jr., entered into a contract with appellant attorneys Norton and Waite to represent his son in a tort action against Trunkline

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

Gas Company, O. R. Burden Construction Company, the Louisville & Nashville Railroad Co., and certain individuals. The retainer agreement that Walters, Jr., signed in procuring the services of these attorneys read as follows:

"I hereby retain and employ Kirk Waite and J. E. Norton as my attorney to prosecute or settle all claims for damage against L & N R R or others who shall be liable on account of injuries of ward—Robert O. Walters, III on or about the 23 day of Aug. A.D. 1966. In consideration for services rendered and to be rendered I agree to pay my attorney a sum equal to 33 1/3 of whatever may be recovered from said claim either by suit, settlement or in any other manner; provided further that I agree to pay my attorney 50% of whatever may be recovered if a second trial or an appeal to the Appellate [sic] of [sic] Supreme Court becomes necessary.

"It is further agreed that in addition to the above attorney fees, all court costs, subpoenae costs, photos, depositions and court reporter costs, reports, witness statements, and expenses directly incurred in investigating or litigating this claim shall be paid by the undersigned client.

ROBERT O. WALTERS, JR.

Guardian for Robert O. Walters, III.

"I hereby agree to the above and further agree to make no charge for services unless recovery is had in above claim and to make no settlement without consent of claimant.

KIRK C. WAITE J. E. NORTON
Attorney

Copy given to client."

The 33 1/3% contingent fee for trial work was handwritten into the contract, while

the 50% contingent fee was in the pre-printed portion of the contract.

On March 25, 1970, Walters, Jr., as guardian of his son's estate, petitioned the Bexar County Court for approval of the contract. The court entered an order authorizing the contract.

On March 23, 1971, upon the resignation of Walters, Jr., the Austin National Bank of Austin, Texas, (Bank) was appointed and qualified as guardian of the estate of the incompetent.

Suit was brought in the Circuit Court of St. Clair County, Illinois, on July 3, 1968. Before going to trial, appellants Norton and Waite retained the services of appellant Kionka, a specialist in civil appeals, who was to act as a consultant at the trial level and have full responsibility for the appeal. Kionka was to be paid out of the additional 16 2/3% stated in the contract for any appellate work.

L. & N. Railroad and O. R. Burden Construction Co. settled before trial for \$180,000. Trunkline, however, refused to settle, and the case went to trial in December 1971. On December 21, 1971, the jury returned a verdict in favor of plaintiff in the amount of \$575,000 compensatory damages and \$750,000 punitive damages, totaling \$1,325,000. This was reduced by the amount of the prior settlement of \$180,000, resulting in a net judgment of \$1,145,000.

On December 7, 1973, Michael Casey, an attorney for the guardian Bank, wrote to Norton and informed him that there was a statute, Tex. Prob. Code Ann., Section 233 (Vernon), which might be construed as limiting plaintiffs attorneys' fees to one-third of the amount recovered. On the basis of this statute, the Bank, as guardian, refused to pay attorneys' fees in excess of one-third of the amount of the settlement. An order was entered authorizing payment to ap-

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

pellants Norton and Waite of \$215,833, one-third of the \$647,500 settlement. The balance, \$107,917, was placed in escrow by Bank pending the outcome of the fee dispute.

After formal demand for the balance by appellants, and refusal by appellee, suit was filed on June 21, 1974, against Bank, as guardian. Jurisdiction was asserted on grounds of diversity of citizenship and requisite amount in controversy. On February 25, 1975, Bank filed a motion for summary judgment which the district court granted on May 19, 1975, on the grounds that (1) the contract was unenforceable under Texas law, (2) it was an adhesion contract, and (3) whether or not the Probate Court of Bexar County ever "approved" the contingent contract did not control enforcement of the contract, since the Probate Court retained jurisdiction of the estate of the ward, and that court withdrew or attempted to withdraw the earlier order "approving" the contract and that the Probate Court refused to approve payment of more than one-third contingent fees to plaintiffs. Appellants' motion for rehearing, and to alter or amend the judgment was denied. This appeal followed.

Appellants urge several issues as possible grounds for reversal, each possibly

1. V.A.T.S. Probate Code, § 233, which provides:

§ 233. Collection of Claims and Recovery of Property

Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he wilfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the

sufficient standing alone to justify reversal. The issues presented are that the retainer contract which provided for a contingent fee of 50% of the amount recovered was valid and binding on a Texas guardian, where that contract was valid in Illinois where it was entered into and performed; that the guardian was estopped from attacking the contract's validity since it accepted the benefits of the contract; that irrespective of the validity of the contract, the order of the probate court approving it was res judicata and thus not subject to collateral attack.

While the reversal which we enter could perhaps be grounded on the conflicts of law point, or the estoppel point, we do not pass on those questions. We rest our decision on the last issue raised.

When the judgment of the Bexar County Court was entered on March 25, 1970, that court, acting as a probate court, had jurisdiction over the estate of Robert O. Walters, III. For that judgment to be questioned, it should have been attacked by a bill of review within two years of the date it was entered. Tex.Prob. Code Ann., Section 31 (Vernon). Appellee Bank argues that the contract involved here is in contravention of Texas¹ law and is thus void and

value of such property as has been lost by such neglect. Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered. Acts 1955, 54th Leg., p. 88, ch. 55. The argument goes that the judgment sought was "property sought to be recovered" inasmuch as it was a chose in action.

Appellants counter that V.A.T.S. Probate Code, § 242 controls. That section provides:

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

unenforceable. However, on facts quite similar to those involved here, the Texas Court of Civil Appeals rejected such an argument:

"[A]ppellee contends that the order approving the claim was void since it was 'in direct violation of V.A.T.S. Probate Code, § 233,' pointing to the fact that the contingent fee contract mentioned in the claim referred to a fifty percent contingent fee while the code reference limits the contingent fee to one-third. We disagree for the reasons now to be stated.

"Even if we concede, which we do not, that the order approving the claim was erroneous, it was, nevertheless a judgment of a court of competent jurisdiction and is safe from a collateral attack. *Lynch v. Baxter*, 4 Tex. 431, 449 (1849). It being an order of the court made in the progress of a rightful administration, touching matters concerning which the court had the right to deliberate and decide, it may not be collaterally impeached because 'however erroneous [it] may be, [it is] not void.' *Withers v. Patterson*, 27 Tex. 491, 497 (1864)."

§ 242. Expenses Allowed

Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safe-keeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claim, and all reasonable

In Re Guardianship of Hair, 537 S.W.2d 82 (Tex.Civ.App.1976) at page 83 of 537 S.W.2d. The Supreme Court of Texas refused an application for writ of error, finding no reversible error.

The March 25, 1970 order of the Probate Court approving the contingent fee agreement had been in effect more than two years on December 7, 1973 when Attorney Casey first raised with plaintiff Norton any question as to the applicability of V.A.T.S. Probate Code § 233 to the fee agreement. An order of the Probate Court attempting to set aside the March 25, 1970 order came still later in time, and was itself set aside by that court, we are informed by counsel. In any event we view these later orders as of no effect on the controversy before us. At the time of all these events the March 25, 1970 order was "safe from collateral attack". *Hair, supra*.

On the basis of *Hair* we determine that summary judgment was improvidently entered, and reverse for further proceedings consistent herewith.

REVERSED.

attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court. Acts 1955, 54th Leg., p. 88, ch. 55.

Our reliance upon *In Re Guardianship of Hair*, Tex.Civ.App., 537 S.W.2d 82, relieves us of any duty to decide which, if either, statute was controlling.

**The United States Court Of Appeals
For The Fifth Circuit**

No. 75-3356

JOHN E. NORTON, ET AL.,

PLAINTIFFS-APPELLANTS,

Versus

THE AUSTIN NATIONAL BANK OF AUSTIN, TEXAS,
INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE
OF ROBERT O. WALTERS, III,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING
(September 14, 1977)

Before GEWIN, AINSWORTH and SIMPSON, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the
same is hereby DENIED.

ENTERED FOR THE COURT:

BRYAN SIMPSON
United States Circuit Judge

**United States Court of Appeals
For the Fifth Circuit**

No. 75-3356

D. C. Docket No. SA-74-CA148

JOHN E. NORTON, ET AL.,

PLAINTIFFS-APPELLANTS,

Versus

THE AUSTIN NATIONAL BANK OF AUSTIN, TEXAS,
INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE
OF ROBERT O. WALTERS, III,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS

Before GEWIN, AINSWORTH and SIMPSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of
the record from the United States District Court for
the Western District of Texas, and was argued by
counsel;

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment
of the said District Court in this cause be, and the
same is hereby, reversed;

It is further ordered that defendant-appellee pay to
plaintiffs-appellants, the costs on appeal to be taxed by
the Clerk of this Court.

Issued as Mandate:

August 15, 1977

**In The United States District Court
For The Western District Of Texas
San Antonio Division**

JOHN E. NORTON, ET AL.	§	
	§	
Vs.	§	
	§	
THE AUSTIN NATIONAL BANK OF	§	CIVIL ACTION
AUSTIN, TEXAS, INDIVIDUALLY	§	NO. SA-74-CA-148
AND AS GUARDIAN OF THE ESTATE	§	
OF ROBERT O. WALTERS, III,	§	
AN INCOMPETENT	§	

JUDGMENT

On April 30, 1975, this cause came on to be heard on motion of the Defendant for an order for summary judgment in favor of the Defendant against the Plaintiffs dismissing the complaint herein on the ground that there is no genuine issue in this case as to any material fact and that the Defendant is entitled to judgment against the Plaintiffs as a matter of law.

On considering the pleadings, the briefs and the affidavits before it, and after hearing the argument of counsel, due deliberation having been had, it appearing to the Court that the question whether the contingent fee contract sued upon by Plaintiffs calling for fifty percent (50%) attorney's fees to be paid by The Austin National Bank as Guardian of the Estate of Robert O. Walters, III, An Incompetent, is to be determined in accordance with Texas law, the law of the domicile and residence of the ward, as well as the law of the state in which the guardianship has at all pertinent times been pending and continues pending, and it appearing that the said contingent fee contract sued upon is not enforceable under Texas law and that were Defendant to pay more than one-third contingent fees, such would be unlawful and a violation of its fiduciary responsibilities to the ward, and it further appearing that there are no

facts alleged or that could be alleged that would give rise to any estoppel or that would make enforcement of the contingent fee contract in question lawful under Texas law, it thus appears that Defendant's motion should be granted and that Defendant is entitled to judgment dismissing Plaintiffs' complaint and denying Plaintiffs' complaint in its entirety.

It is therefore ORDERED that Defendant's motion for summary judgment be and the same hereby is granted.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing against Defendant and that costs be and are hereby adjudged against Plaintiffs.

The Court is further of the opinion that the contingent fee contract in question, according to the affidavits before the Court submitted by Plaintiffs themselves, may be and is a contract of adhesion as to the incompetent ward and not enforceable for that additional reason, it appearing from said affidavits and from the form of contract used that the guardians and ward had no choice but to enter into the contract in question and that the provision in the contract calling for fifty percent (50%) attorney's fees was not negotiable. This finding that the contingent fee contract sued upon is a contract of adhesion and thus not enforceable is an independent basis for the granting of Defendant's motion for summary judgment and is merely an additional ground therefor. The Court further finds as a matter of fact and of law that whether or not the Probate Court of Bexar County ever "approved" the contingent fee contract in question is not controlling as to the enforceability of the contract at this time. It is undisputed as a matter of fact that the Probate Court of Bexar County retains jurisdiction of the estate of the ward, that the Probate Court withdrew or attempted to withdraw its earlier order "approving" the unlawful contract, and that the Probate Court has not and will not approve the payment of more than one-third contingent fees to Plaintiffs.

This judgment shall constitute the Court's conclusions.

MANUEL L. REAL, *Judge Presiding*

**United States District Court
Western District Of Texas
San Antonio Division**

JOHN E. NORTON, ET AL.

Vs.

SA-74-CA-148

THE AUSTIN NATIONAL BANK
OF AUSTIN, TEXAS, ETC.

JUDGMENT

This action came on for consideration before the Court, Honorable Manuel L. Real, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is, therefore, ORDERED AND ADJUDGED that defendant's motion for summary judgment is granted, plaintiffs take nothing against defendant, and costs are adjudged against plaintiffs.

DATED at San Antonio, Texas, this 14th day of July, 1977, nunc pro tunc May 23, 1975.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By CAROLYN R. WRIGHT
Deputy

**IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 75-3356

JOHN E. NORTON, ET AL.,

APPELLANTS,

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY,
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT,

APPELLEE.

**APPELLEE'S MOTION FOR STAY OF MANDATE
PENDING APPLICATION TO SUPREME COURT FOR
WRIT OF CERTIORARI**

Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

H. Lee Godfrey, Esq.
GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD

2300 Austin National Bank Tower
Austin, Texas 78701

ATTORNEYS FOR APPELLEE

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3356

JOHN E. NORTON, ET AL,
PLAINTIFFS-APPELLANTS

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

CERTIFICATE REQUIRED BY
FIFTH CIRCUIT LOCAL RULE 13 (a)

The undersigned, counsel of record for THE AUSTIN NATIONAL BANK, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualifications or recusal pursuant to Local Rule 13(a).

<u>Parties</u>	<u>Connection or Interest</u>
John E. Norton Belleville, Illinois	Plaintiff
Kirk C. Waite Nashville, Tennessee	Plaintiff
Edward J. Kionka Belleville, Illinois	Plaintiff

Austin National Bank
Austin, Texas Defendant

Robert O. Walters, Jr.
San Antonio, Texas Former guardian of estate and
guardian of person of the ward
whose estate is represented by
defendant bank.

Robert O. Walters, III,
an incompetent Ward whose estate is represented
San Antonio, Texas by defendant bank.

H. LEE GODFREY
Attorney for Appellee

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3356

JOHN E. NORTON, ET AL,
APPELLANTS,

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT,
APPELLEE.

APPELLEE'S MOTION FOR STAY OF MANDATE
PENDING APPLICATION TO SUPREME COURT FOR
WRIT OF CERTIORARI

Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

TO THE HONORABLE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT:

Appellee hereby respectfully moves that, pursuant to Rule 41, Federal Rules of Appellate Procedure, a thirty (30) day stay of the mandate in this case be granted pending application to the Supreme Court of the United States for a writ of certiorari. Appellee would show that this motion is timely filed under the said Rule 41 and that application for certiorari will be timely made to the Supreme Court of the United States.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this motion be granted and that the requested stay for thirty (30) days before issuance of the mandate in this cause be granted pending application for writ of certiorari.

Respectfully submitted,

**GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD**

*2300 Austin National Bank Tower
Austin, Texas 78701*

By H. LEE GODFREY

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellee's Motion for Stay of Mandate Pending Application to Supreme Court for Writ of Certiorari was mailed, certified mail, return receipt requested to the opposing counsel, Robert B. Summers, Esq., Clark, Thornton & Summers, 1910 Tower Life Bldg., San Antonio, Texas 78205 and Edward J. Kionka, Esq., 211 West Main Street, Belleville, Illinois 62220, on this the 30th day of September, 1977.

H. LEE GODFREY

§233. Collection of Claims and Recovery of Property

Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he willfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the value of such property as has been lost by such neglect. Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered. Acts 1955, 54th Leg., p. 88, ch. 55.

§242. Expenses Allowed

Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safe-keeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claim, and all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court. Acts 1955, 54th Leg., p. 88, ch. 55.

Supreme Court, U. S.
FILED

NOV 25 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1977

No. 77 - 627

**THE AUSTIN NATIONAL BANK, Individually, and as
Guardian of the Estate of ROBERT O. WALTERS, III,
an Incompetent,**

Petitioner,

v.

JOHN E. NORTON, et al,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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INDEX

	PAGE
QUESTION PRESENTED FOR REVIEW	1
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
ARGUMENT	4
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX: IN RE GUARDIANSHIP OF HAIR	1a

CITATIONS

Cases

Bott v. American Hydrocarbon Corp., 458 F.2d 229 (5th Cir. 1972)	6
Cockburn v. O'Meara, 141 F.2d 779 (5th Cir. 1944)	6
Finley v. Hartsook, 158 F.2d 618 (5th Cir. 1946)	6
Glasgow v. McKinnon, 79 Tex. 116, 14 S.W. 1050 (1890)	5
Heard v. Vineyard, 212 S.W. 489 (Tex. Comm. App. 1919)	6
Hennessey v. Automobile Owners' Ins. Ass'n, 282 S.W. 791 (Tex. Comm. App. 1926)	6
In re Guardianship of Hair, 537 S.W.2d 82 (Tex. Civ. App. 1976), writ ref. n.r.e.	7
In re Guardianship of Neal, 406 S.W.2d 496 (Tex. Civ. App. 1966), writ ref. n.r.e. 407 S.W.2d 770 (Tex. 1966)	4

Parkins v. Martin, 395 S.W.2d 862 (Tex. Civ. App. 1965) writ ref. n.r.e.	6
Pierson v. Smith, 292 S.W.2d 689 (Tex. Civ. App. 1956), writ ref. n.r.e.	5
Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958)	6

Statutes and Rules

28 U.S.C. § 1254 (1)	4
Texas Probate Code § 31	2, 7
Texas Probate Code § 233	1, 6, 7, 8, 9
Texas Probate Code § 242	8
United States Supreme Court Rule 19 (1)(b)	4

Other

12 Tex. Jur. 2d Conflict of Laws, §§ 9, 12	6
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IN THE
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QUESTION PRESENTED FOR REVIEW

The question presented is more accurately stated as whether the United States Court of Appeals for the Fifth Circuit manifestly erred in holding that, notwithstanding the provisions of § 233 of the Texas Probate Code, Respondents' Illinois contract with the guardian

for legal services and fees is enforceable in accordance with its terms, where Respondents fully and successfully performed the agreed services, and where the contract was approved in advance of performance by an order of the Texas probate court having jurisdiction of the estate and the time for review of that order has expired.

STATUTES INVOLVED

In addition to §§ 233 and 242 of the Texas Probate Code, cited by Petitioner, § 31 is also pertinent:

Any person interested may, by a bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order or judgment shall be stayed except by writ of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order, or judgment. Persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to apply for a bill of review. Acts 1955, 54th Leg., p. 88, ch. 55.

STATEMENT OF FACTS

In addition to the facts stated by Petitioner, the following additional facts are pertinent.

Respondents Norton, an Illinois attorney, and Waite, a Tennessee attorney, entered into the contract for legal services which is the subject of this litigation in Norton's

office in Belleville, Illinois on March 10, 1970. By this contract, Norton and Waite promised to represent the estate in its claim for damages on behalf of the ward for the injury which rendered him incompetent. This contract was in a form and amount regularly and customarily executed in similar cases in Illinois. On March 25, 1970, the guardian petitioned the County Court of Bexar County, Texas (sitting as a probate court) for approval of the contract. An order authorizing the requested employment was entered by the court on that date.

The contract was fully performed by Respondents in Illinois (the state where the injury to the ward occurred). Norton, assisted by Waite and Kionka (an Illinois attorney and law professor who handles civil appeals and the legal aspects of trials as a consultant to other lawyers), prepared, filed, and tried the lawsuit in the Circuit Court of St. Clair County, Illinois. At the conclusion of the trial (in December, 1971), the jury returned a verdict in favor of the Petitioner as guardian in the amount of \$1,325,000. An appeal was instituted by defendant, and during the course of that appeal (in December 1973), the case was settled (with the approval of the guardian) for \$647,500. This sum, when added to \$180,000 received prior to trial from two other defendants, made a total award of \$827,500.

Following the settlement of the judgment, Respondents were advised for the first time by Petitioner of its position that § 233 of the Texas Probate Code prohibited Respondents from receiving the full amount of their contractual fee out of the \$647,500 settlement. (The \$180,000 settlement prior to trial is not involved in this dispute.) After formal demand and refusal, this lawsuit was instituted.

ARGUMENT

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), which merely gives the Court the power to award writs of certiorari to review judgments of the United States Courts of Appeals. However, Petitioner has wholly failed to show how this case falls within the provisions of Rule 19 of the Rules of this Court, which provides that a writ of certiorari will be granted *only* where there are "special and important reasons therefor." Among the reasons stated in the Rule as illustrative of those which would support the granting of a writ, the only one which could possibly have any application here is the case where:

"... a court of appeals ... has decided an important state ... question in a way in conflict with applicable state ... law;" Rule 19(1)(b).

There is no federal question involved, nor does Petitioner claim any procedural error below.

Petitioner's entire argument rests upon the premise that the order of the probate court approving the contract in question was *void*. The fact is, however, that Texas law is quite clear that the order in question, even assuming for the sake of argument that it is erroneous (which we deny), was *no more than* erroneous and *voidable* and no longer may be attacked in any manner.

In support of its argument that the decision of the Court of Appeals below is contrary to Texas law, Petitioner cites only two Texas cases. The most recent one, *In re Guardianship of Neal*, 406 S.W. 2d 496 (Tex. Civ. App. 1966), writ ref. n.r.e., 407 S.W.2d 770 (Tex. 1966), affirmed an order of the trial court holding that a

guardian had no power to make a gift of the ward's estate. No question was raised or decided as to the effect of such an order authorizing a gift had it been entered; and in any event, the power of a guardian to make a gift is so different from the power of a guardian to contract for legal representation that the *Neal* case can scarcely be said to be authority which is in conflict with the decision below.

The other case cited by Petitioner, *Glasgow v. McKinnon*, 79 Tex. 116, 14 S.W. 1050 (1890), involved the question whether the trial court erred in allowing into evidence in some unspecified proceeding proof concerning an order entered by the probate court authorizing the sale for partition of land which was part of the guardianship estate. The Texas Supreme Court held that the evidence should not have been admitted, because the probate court lacked jurisdiction to enter such an order; statutory authority for such a sale was totally absent, and therefore the matter was beyond the powers granted to the court. The court noted:

"There is no ground for the presumption that some other legal cause for the sale was made known to the court, or that the sale was ordered upon such ground. Had the order stood alone, without any petition, presumptions might arise to sustain the jurisdiction of the court, but such presumptions cannot be indulged against proof which affirmatively appears in the record not impeached by the order itself." 14 S.W. at 1050.

In other words, if *any* ground could have been found, however erroneous, upon which such an order could have been based, then the jurisdiction of the court would have been presumed and the order would have been at most erroneous and voidable (on review by direct appeal) but not void. As we argued below, this is the clear import of well-established Texas law. *Pierson v.*

Smith, 292 S.W.2d 689 (Tex. Civ. App. 1956), writ ref. n.r.e.; *Heard v. Vineyard*, 212 S.W. 489 (Tex. Comm. App. 1919); *Parkins v. Martin*, 395 S.W.2d 862 (Tex. Civ. App. 1965), writ ref. n.r.e.; *Finley v. Hartsook*, 158 F.2d 618, 621-22 (5th Cir. 1946).

This is exactly the situation in the case at bar. As we argued below, there are at least two grounds upon which the probate court could have entered its order of March 25, 1970 approving the contract in question, despite the existence of § 233 of the Texas Probate Code. First, it could have determined that under applicable principles of conflict of laws, Illinois law applied to determine the validity of the contract. *Teas v. Kimball*, 257 F.2d 817 (5th Cir. 1958); *Cockburn v. O'Meara*, 141 F.2d 779 (5th Cir. 1944); 12 Tex. Jur. 2d Conflict of Laws, §§ 9, 12. Second, it could have determined that under the language of § 233, the purported limitation of contingent fees to one-third of the "property" recovered does not apply to unliquidated tort claims, and therefore the contract could be approved under the language of § 242 of the Texas Probate Code, which authorizes "all reasonable" attorney's fees without such limitation. *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972) (court will give effect to omission of term in one part of statute which was used in another part); *Hennessy v. Automobile Owners' Ins. Ass'n*, 282 S.W. 791 (Tex. Comm. App. 1926) (contract will not be rendered void by statute unless statute does so directly and expressly in unmistakable language). Both of these points were fully argued in the briefs below. We will not burden the Court with those arguments here, since we need only demonstrate that there is some colorable ground for the probate court's order in order to sustain that court's jurisdiction to enter it.

Even more importantly, Petitioner's argument completely ignores the recent case, *In re Guardianship of Hair*, 537 S.W.2d 82 (Tex. Civ. App. 1976), writ ref. n.r.e., which the Court of Appeals below found decisive. The *Hair* case is indistinguishable in its operative facts from the case at bar. There, as here, the probate court attempted to rescind its prior approval of a claim by attorneys for legal services rendered to the estate of a ward on the ground that the amount of the claim exceeded that authorized by § 233 of the Texas Probate Code. The Texas Court of Civil Appeals held that regardless of whether the attorneys' fee was authorized by § 233, the order approving the claim was a final and appealable order which could not be attacked following the expiration of the time authorized by statute for review of that order. A copy of the opinion in the *Hair* case is appended to this brief.

As the Court of Appeals below found, the *Hair* case is controlling. The identical statute and issue were involved. In both cases the time for review of the prior order had expired, and the court in *Hair* held that the order thereupon became final and could not be attacked or nullified. (In the instant case, the time for review expired on March 25, 1972. Texas Probate Code, § 31.)

Therefore, Petitioner's claim that the decision of the Court of Appeals below is contrary to existing Texas law is wholly without merit and, we suggest, even frivolous.

Moreover, in the Court of Appeals below, we argued five *additional* grounds, each of which standing alone would have been sufficient to support reversal and sustain the validity of our claim. These grounds may be summarized as follows:

1. *Conflict of Laws.* Texas conflict of laws rules require that Illinois law be applied in determining the validity and enforceability of the contract. Illinois law would sustain this contract.

2. *Estoppel.* Having accepted the benefits of the order of the probate court, as well as of the contract, the guardian is estopped to attack their validity, especially where even if the contract is enforced as written, the estate will receive over 86% of the amount of the jury's verdict for compensatory damages.

3. *Statutory Construction.* Properly construed, § 233 of the Texas Probate Code does not prohibit the contract in question, and therefore the probate court had the power to approve the contract under § 242.

4. *Individual Liability.* Regardless of whether the contractual fee could properly be paid out of the estate, the guardian is individually bound by the contract. Whether he can obtain reimbursement from the estate is a matter solely between the guardian and the probate court.

With reference to these arguments, the Court of Appeals below noted:

"Appellants urge several issues as possible grounds for reversal, *each possibly sufficient standing alone to justify reversal.* The issues presented are that the retainer contract which provided for a contingent fee of 50% of the amount recovered was valid and binding on a Texas guardian, where that contract was valid in Illinois where it was entered into and performed; that the guardian was estopped from attacking the contract's validity since it accepted the benefits of the contract; that irrespective of the validity of the contract, the order of the probate court approving it was *res judicata* and thus not subject to collateral attack.

"While the reversal which we enter could perhaps be grounded on the conflicts of law point, or the estoppel point, we do not pass on those questions. We rest our decision on the last issue raised." Opinion, p. 3; Petition, p. 8 (emphasis added).

Therefore, not only is the decision of the Court of Appeals in accord with Texas law on the ground upon which it rests; there were several *additional* grounds, all (we submit) equally valid and each "possibly sufficient standing alone to justify reversal." These arguments were also based on well-established principles of Texas law.

Finally, we believe it is obvious that this case is not of sufficient significance and national import to justify the valuable time and attention of this Court. Petitioner has wholly failed to demonstrate that there are "special and important reasons" for granting the writ. Petitioner suggests that the decision of the Court of Appeals below "casts doubt upon what has been the clear rule of statutory construction in Texas" (Petition, p. 4), and will unsettle the administration of estates in Texas. However, the opinion manifestly has no such effect. First of all, it was not based on any statutory construction, but rather on *res judicata*. In fact, the Court of Appeals expressly declined to decide the statutory construction issue which we had raised. Opinion, footnote 1, pp. 3-4, Petition, pp. 8-9. Thus, § 233 remains unaffected. Second, being based on *res judicata*, the decision has application solely to the case at bar and clearly has no pervasive effect as suggested by Petitioner. For this reason, and involving as it does an Illinois contract, the case is unique and cannot possibly have any general effect on the administration of Texas estates. Third, the case is clearly not disruptive of Texas law because it squarely follows

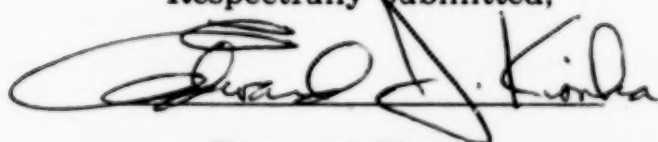
the *Hair* case, a Texas decision approved by the Texas Supreme Court.

The Petition For A Writ of Certiorari is wholly without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition be denied; and Respondents further pray for relief under Rule 56(4) of the Rules of the United States Supreme Court. A motion seeking relief under Rule 56(4) will be filed in due course when Respondents' costs, expenses and fees can be determined.

Respectfully submitted,



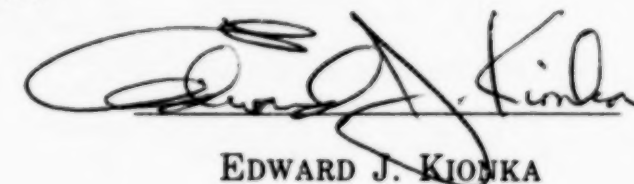
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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Brief In Opposition to the Petition For A Writ of Certiorari To The United States Court Of Appeals for the Fifth Circuit have been served upon Petitioner and its counsel by depositing same, in a sealed envelope with first class postage prepaid, in the United States Post Office in Columbia, Illinois, addressed to Wm. Terry Bray, Graves, Dougherty, Hearon, Moody & Garwood, 2300 Austin National Bank Tower, Austin, Texas 78701, on November 23, 1977.


EDWARD J. KIONKA

APPENDIX

In re GUARDIANSHIP OF Jonell
HAIR, N.C.M.

No. 7759.

Court of Civil Appeals of Texas,
Beaumont.

April 1, 1976.

Rehearing Denied May 13, 1976.

The County Probate Court, Liberty County, Harlan D. Friend, J., refused to approve a final account of guardian, and an appeal was taken. The Court of Civil Appeals, Keith, J., held that even if an order approving a claim against an estate under guardianship was erroneous, it could not be collaterally impeached, and a new county judge could not properly refuse to approve the final account of a guardian because of payment of such already approved claim.

Order insofar as purporting or attempting to modify claim vacated and set aside.

1. Guardian and Ward ⇐67

Where claimants followed implicitly provisions of statute in procuring approval and payment of their claim from estate of ward, approval of claim by county judge had force and effect of final judgment, and could be reviewed only by appeal. V.A.T.S. Probate Code, §§ 233, 312(d, e); Rules of Civil Procedure, rule 329b.

2. Guardian and Ward ⇐67, 155

Even if order approving claim against estate under guardianship, for attorney fees, was erroneous, it could not be collaterally impeached, and new county judge could not properly refuse to approve final account of guardian because of payment of such already approved claim. V.A.T.S. Probate Code, §§ 233, 312(d, e); Rules of Civil Procedure, rule 329b.

Richard R. Morrison, III, Liberty, for appellant.

C. Bruce Stratton, Liberty, for appellee.

KEITH, Justice.

Intervenors appeal from an unfavorable order entered by the constitutional county court of Liberty County sitting in probate. Our appellants, a firm of lawyers, performed many and diverse services for the ward and her estate, including the successful disposition of a murder case. After the conclusion of their services, their claim was submitted by the guardian of the person and estate to and was duly approved by the county judge by an order dated July 1, 1974. After the allowance and approval of the claim by the court, the guardian paid the attorneys the amount allowed by the court: \$37,943.93 for their services. No appeal was taken from the order approving the payment of this claim.

Thereafter, the guardian filed her final account wherein she showed, *inter alia*, the payment to the attorneys as noted above. The new county judge refused to approve the final account unless there was a substantial reduction in the amount of such fees, suggesting that the intervenors should remit the sum of \$30,443.73 into the registry of the court.

Intervenors, challenging the jurisdiction of the county judge to enter such an order of remittitur, declined to make the suggested payment and appealed from the order requiring such payment. There has been no challenge of our jurisdiction and we proceed to a determination of the questions presented by the briefs of the parties.

[1] Intervenors followed implicitly the provisions of Tex.Prob.Code Ann. § 312(d) in procuring the approval and payment of their claim; thus, the approval of the claim by the county judge had the "force and effect of [a] final judgments." Probate Code § 312(d). The allowance of the claim could be reviewed only by appeal. *De Cordova v. Rogers*, 97 Tex. 60, 75 S.W. 16, 19 (1903). Tex.Prob.Code Ann. § 312(c) provides an exclusive remedy in this type of claim. 18 M. Woodward & E. Smith Texas Practice, Probate and Decedents' Estates, § 928, p. 265 (1971). See also, *Jones v. Wynne*, 133 Tex. 436, 129 S.W.2d 279, 283 (1939).

The constitutional county court having approved intervenor's claim on July 1, 1974, its judgment became final thirty days thereafter. Tex.R.Civ.P. 329b. And, as stated in the text cited earlier (18 Texas Practice § 927), "It [the order approving the claim] is immune to collateral attack on evidence outside the record and is governed

by the usual presumptions in favor of the validity of judgments of the probate court."

[2] But appellee contends that the order approving the claim was void since it was "in direct violation of V.A.T.S. Probate Code, § 233," pointing to the fact that the contingent fee contract mentioned in the claim referred to a fifty percent contingent fee while the code reference limits the contingent fee to one-third. We disagree for the reasons now to be stated.

Even if we concede, which we do not, that the order approving the claim was erroneous, it was, nevertheless, a judgment of a court of competent jurisdiction and is safe from a collateral attack. *Lynch v. Baxter*, 4 Tex. 431, 449 (1849). It being an order of the court made in the progress of a rightful administration, touching matters concerning which the court had the right to deliberate and decide, it may not be collaterally impeached because "however erroneous [it] may be, [it is] not void." *Withers v. Patterson*, 27 Tex. 491, 497 (1864).

The order of the probate judge of Liberty County entered in Cause No. 4151 upon the docket of said court on April 2, 1975, insofar as it purports or attempts to modify the claim of attorney's fees approved on July 1, 1974, is here and now vacated, set aside, and henceforth the same shall stand for naught.

It is SO ORDERED.

